

56. We conclude therefore that, to be engaged in the provision of electronic publishing services subject to section 274, the BOC must disseminate the information via its basic telephone service (as defined by 274(i)(2)) and have control of, or a financial interest in, the content of the information being provided. Similarly, we also conclude that control of, or a financial interest in, the content of the information alone, without BOC dissemination of information, is not electronic publishing under section 274.¹³⁷

57. We note that, to the extent a BOC disseminates electronic publishing services through the facilities of a competing wireline local exchange carrier, or commercial mobile service provider, and thus is not required to provide such services through a separated affiliate or electronic publishing joint venture, it may still be subject to the joint marketing prohibition of section 274(c)(1)(B). As discussed below, this section contemplates situations in which a BOC affiliate is involved in the provision of services that are "related to" the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service.¹³⁸

B. "Separated Affiliate" and "Electronic Publishing Joint Venture" Requirements of Section 274

1. The "Operated Independently" Requirement of Section 274(b)

a. Background

58. Section 274(b) states that a separated affiliate or electronic publishing joint venture established to provide electronic publishing services pursuant to section 274(a) shall be "operated independently" from the BOC. Subsections 274(b)(1)-(9) then list nine structural separation and transactional requirements that apply to the separated affiliate or electronic publishing joint venture.¹³⁹ In the *Notice* we addressed only the structural separation requirements of section 274(b) and only those requirements are addressed herein.¹⁴⁰ Subsections 274(b)(1), (3), (4), (8), and (9) are transactional requirements that are addressed in the *Accounting Safeguards Order*.¹⁴¹ We observed in the *Notice* that the structural separation requirements of section 274(b) do not refer, in all instances, to both separated

¹³⁷ See NYNEX at 6.

¹³⁸ See *infra* ¶¶ 120-122.

¹³⁹ 47 U.S.C. § 274(b).

¹⁴⁰ See *Notice* at ¶ 35, n.51.

¹⁴¹ See *Accounting Safeguards Order* at ¶¶ 225-26, 240-44.

affiliates and electronic publishing joint ventures.¹⁴² We, therefore, sought comment on whether Congress intended the phrase "operated independently" to have a different meaning for separated affiliates and for electronic publishing joint ventures.¹⁴³ We also sought comment in the *Notice* on whether the Commission should adopt additional regulatory requirements to ensure compliance with the "operated independently" requirement of section 274(b).¹⁴⁴

b. Comments

59. Several commenters argue that Congress intended the phrase "operated independently" to have the same meaning for separated affiliates and electronic joint publishing ventures when subsections 274(b)(1)-(9) refer to both separated affiliates and electronic publishing joint ventures. They note, however, that some of the requirements of section 274(b) do not apply to electronic publishing joint ventures. Where the statutory language does not refer to both separated affiliates and electronic publishing joint ventures, these commenters maintain that the phrase "operated independently" should not be read to render all the requirements in subsections (b)(1)-(9) applicable to both separated affiliates and electronic publishing joint ventures; they contend, for example, that sections 274(b)(5) and 274(b)(7) are inapplicable to electronic publishing joint ventures since those subsections refer only to separated affiliates.¹⁴⁵ Other commenters argue that the language "operated independently" compels us to apply all of the section 274(b) requirements to separated affiliates and electronic publishing joint ventures.¹⁴⁶

60. As to the issue of whether we should adopt regulatory requirements to ensure compliance with the "operated independently" requirement of section 274(b), BOCs and several trade associations argue that the structural and transactional safeguards of section 274 are clear, self-executing and comprehensive. They assert that Congress could have expressly provided for additional requirements had it deemed them necessary to ensure the operational

¹⁴² Some of the subsections of section 274(b) refer only to a BOC and its separated affiliate, while others refer to a BOC and its separated affiliate or electronic publishing joint venture.

¹⁴³ *Notice* at ¶ 35.

¹⁴⁴ *Id.*

¹⁴⁵ Ameritech Reply at 10; AT&T at 13; Bell Atlantic at 5; Bell Atlantic Reply at 4-5; BellSouth at 11-12; BellSouth Reply at 11; NAA at 4; NYNEX at 8-9; NYNEX Reply at 4-5; PacTel at 9-10; PacTel Reply at 6; SBC at 5-6; USTA at 4.

¹⁴⁶ MCI at 4-5 (contending that section 274(b)(5) should be applied both to separated affiliates and electronic publishing joint ventures); Time Warner at 12 n.19, 14-15 (contending that both sections 274(b)(5) and (7) apply to separated affiliates and electronic publishing joint ventures); Time Warner Reply at 18-19.

independence of BOCs from their separated affiliates and electronic publishing joint ventures.¹⁴⁷ They further assert that the phrase "operated independently" is not a separate substantive restriction, as their competitors maintain, but that subsections 274(b)(1)-(9) reflect Congress' determination of the requirements necessary to achieve operational independence.¹⁴⁸

Several of these commenters observe that this position is consistent with the Commission's interpretation of the same language in *Computer II* and the cellular separation rules, where "operate independently" is not given an independent meaning.¹⁴⁹ Finally, several commenters assert that Congress did not grant the Commission authority to adopt additional regulations in section 274(b).¹⁵⁰

61. Other commenters contend that the inclusion of the phrase "operated independently," in addition to the requirements in subsection 274(b)(1)-(9), supports the conclusion that we are authorized to and should adopt additional regulations to ensure compliance with section 274(b). They maintain that the "operated independently" language is a separate substantive requirement from those restrictions in subsections 274(b)(1)-(9).¹⁵¹ These commenters urge us to read the "operated independently" language as authorizing us to adopt additional rules such as those adopted in *Computer II*. Specifically, they urge us to adopt regulations precluding the separated affiliated or joint venture from: (1) leasing or sharing physical space collocated with regulated transmission facilities used to provide basic service; (2) sharing computer facilities with the local exchange carrier; (3) developing software jointly with the regulated entity; and (4) marketing any other equipment or services to any affiliate.¹⁵² Time Warner further proposes that we adopt regulations precluding the separated affiliate or electronic publishing joint venture from constructing, owning or operating its own transmission facilities, thereby requiring the separated affiliate or joint venture to purchase its capacity from the regulated carrier under tariff and ensuring "that local exchange monopoly power is not leveraged into the provision of electronic publishing."¹⁵³

¹⁴⁷ Ameritech Reply at 9; Bell Atlantic at 4-6; Bell Atlantic Reply at 4-5; BellSouth at 12-13; Joint Parties at 2 (contending, without specific reference to section 274(b), that section 274 is self-executing); NYNEX at 8-9; NYNEX Reply at 4-5; PacTel at 9-10; PacTel Reply at 6; SBC at 5-6; SBC Reply at 3-4; USTA at 4; U S WEST at 4-5 n.11; U S WEST Reply at 6-7; YPPA at 3; YPPA Reply at 2-3.

¹⁴⁸ Bell Atlantic at 5; BellSouth Reply at 12-13; NYNEX Reply at 4-6; PacTel Reply at 6; U S WEST at 4 n.11 (also contending that it is premature for us to exercise any regulatory authority we might have until there is a demonstrated necessity); U S WEST Reply at 6-7; YPPA Reply at 2-3.

¹⁴⁹ Bell Atlantic at 5-6; BellSouth at 13; SBC Reply at 3-4; YPPA at 3-4.

¹⁵⁰ Ameritech Reply at 9; BellSouth at 10; NYNEX at 8; NYNEX Reply at 4; PacTel at 9-10; U S WEST Reply at 6-7; YPPA at 3.

¹⁵¹ AT&T at 13-14; AT&T Reply at 12-14; MCI Reply at 2-4; Time Warner at 11-13.

¹⁵² AT&T at 14 & n.10; MCI Reply at 5; Time Warner at 12-13.

¹⁵³ Time Warner at 13.

c. Discussion

62. We conclude that the "operated independently" requirement of section 274(b) obligates a separated affiliate to comply with all the requirements of subsections 274(b)(1)-(9). We further conclude that an electronic publishing joint venture, to comply with the "operated independently" requirement of section 274(b), need only satisfy the requirements of subsections 274(b)(1)-(4), (6), and (8)-(9), since subsections 274(b)(5) and 274(b)(7) specifically refer to separated affiliates and not to electronic publishing joint ventures. We discuss more fully below the structural separation requirements of section 274(b), *i.e.*, subsections 274(b)(2), and (5)-(7). As noted above, the transactional requirements of section 274(b), *i.e.*, subsections 274(b)(1), (3), (4), (8), and (9), are discussed in the *Accounting Safeguards Order*.

63. We reject the arguments made by certain commenters that the phrase "operated independently" is a separate substantive restriction that requires us to apply subsections 274(b)(1)-(9) to both separated affiliates and electronic publishing joint ventures even where the statute refers only to a separated affiliate. We see no reason for Congress to have expressly referred in section 274(b)(5) and section 274(b)(7) to separated affiliates if the restrictions in those subsections were intended to apply to both separated affiliates and electronic publishing joint ventures.

64. We also reject the similar argument that the phrase "operated independently" is a separate substantive restriction authorizing us to adopt additional restrictions beyond those in subsections 274(b)(1)-(9). There is no evidence in the statute or its legislative history that Congress intended the restrictions in section 274(b) merely to be a list of minimum requirements that need to be supplemented by additional rules to be imposed on separated affiliates or electronic publishing joint ventures. We find, therefore, that the "operated independently" requirement in section 274(b) is satisfied if a BOC and its separated affiliate or electronic publishing joint venture comply with the applicable restrictions in subsections 274(b)(1)-(9), as noted above.¹⁵⁴ While we decline to adopt additional restrictions beyond those in subsections 274(b)(1)-(9), we reject the argument that Congress did not grant the Commission the authority to do so.¹⁵⁵

65. This interpretation of the "operated independently" requirement in section 274(b) is not inconsistent with our determination in the *Non-Accounting Safeguards Order* that the section 272(b)(1) "operate independently" provision imposes requirements beyond those contained in subsections 272(b)(2)-(5).¹⁵⁶ The "operated independently" requirement in section 274(b) is followed by nine substantive restrictions that we read as the criteria to be

¹⁵⁴ See *supra* ¶ 62.

¹⁵⁵ See *supra* ¶¶ 14-20.

¹⁵⁶ *Non-Accounting Safeguards Order* at ¶¶ 156-70.

satisfied to ensure operational independence between a BOC and its electronic publishing entity created pursuant to section 274(a). In contrast, the "operate independently" provision in section 272 appears in subsection 272(b)(1), which is one of five separate substantive requirements in section 272(b).¹⁵⁷

2. Section 274(b)(2)

a. Background

66. Section 274(b)(2) provides that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the [BOC]."¹⁵⁸ We sought comment in the *Notice* on the types of activities a BOC, a separated affiliate, or an electronic publishing joint venture are precluded from engaging in under section 274(b)(2). We tentatively concluded that a BOC may not cosign a contract, or any other instrument, with a separated affiliate or an electronic publishing joint venture by which it would incur debt in violation of section 274(b)(2). We also sought comment on: whether this subsection affects a separated affiliate differently than an electronic publishing joint venture because of their different corporate relationships to the BOC, and whether we should establish specific requirements regarding the types of activities contemplated by section 274(b)(2).¹⁵⁹

b. Comments

67. A number of commenters generally agree with our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that allows a creditor, upon default, to have recourse to the assets of the BOC.¹⁶⁰ AT&T and MCI maintain that we should also interpret section 274(b)(2) to prohibit a BOC's parent holding company from co-signing a debt of a separated affiliate or electronic publishing joint venture.¹⁶¹ The BOCs, in reply, assert that interpreting section 274(b)(2) to preclude a BOC's parent company from

¹⁵⁷ *Contra* AT&T Reply at 12-13.

¹⁵⁸ 47 U.S.C. § 274(b)(2).

¹⁵⁹ *Notice* at ¶¶ 37-38.

¹⁶⁰ AT&T at 15-16 (stating, however, that we should clarify that section 274(b)(2) is not limited to such "obvious violations" and that we should retain flexibility to deal with other credit arrangements that may come to our attention); Bell Atlantic Reply at 8-9; MCI at 4; NAA at 4; NYNEX Reply at 6; SBC at 6 (contending that the provision is "self-explanatory" and that "no useful purpose would be served by . . . promulgating a regulation prohibiting a BOC from cosigning a contract or any other instrument . . .").

¹⁶¹ AT&T at 15-16; MCI at 4.

cosigning a contract or any other instrument with a BOC's separated affiliate or electronic publishing joint venture is neither supported by the statutory language nor public policy. They further state that there is no need for additional regulations to effectuate section 274(b)(2).¹⁶²

c. **Discussion**

68. As stated in the *Notice*, we find that the intent of section 274(b)(2) is to protect BOC local exchange and exchange access service subscribers from bearing the cost of default by BOC affiliates.¹⁶³ We adopt our tentative conclusion that section 274(b)(2) prohibits a BOC from cosigning with a separated affiliate or an electronic publishing joint venture a contract, or any other instrument, that would incur debt in a manner that grants the creditor recourse, upon default, against the assets of a BOC.¹⁶⁴ Consistent with this conclusion, we further conclude that a BOC's parent is precluded from cosigning a contract or other instrument for a BOC's separated affiliate or electronic publishing joint venture, if the effect is to provide its creditor with recourse, upon default, to a BOC's assets. We reject, however, the arguments urging us to extend the restrictions in section 274(b)(2) to preclude a BOC's section 274 separated affiliate or electronic publishing joint venture from incurring debt in a manner that would permit a creditor, upon default, to have recourse to the assets of a BOC parent holding company, provided that this recourse does not effectively result in recourse to the assets of the BOC. The text of the statute does not support the proposed restriction. Moreover, it would leave section 274 separated affiliates and electronic publishing joint ventures at a disadvantage as compared with other electronic publishing companies that are permitted to rely upon the credit of their parent corporations.¹⁶⁵

69. We decline to apply this section differently as to separated affiliates and electronic publishing joint ventures. No arguments were advanced supporting the need for different treatment with respect to these alternate vehicles for providing electronic publishing services, and we see no evidence at this time indicating that this subsection affects these entities differently. In this regard we agree with SBC that "no useful purpose would be served by . . . speculating as to whether the subsection might affect a separated affiliate

¹⁶² Bell Atlantic Reply at 8-9; BellSouth Reply at 13; NYNEX Reply at 6; PacTel Reply at 7; SBC Reply at 7; U S WEST Reply at 7-8.

¹⁶³ *Notice* at ¶ 36.

¹⁶⁴ We note that the term "Bell operating company" is defined in section 274(i)(10), which references section 3 of the Act (47 U.S.C. § 153(4)).

¹⁶⁵ *Accord* Bell Atlantic Reply at 8-9.

differently than a joint venture," and that we should proceed on a case-by-case basis, rather than adopt a "one size fits all" rule.¹⁶⁶

70. We reject AT&T's proposal that we require contracts or other instruments through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse either to the assets of a BOC or to the assets of the parent holding company of a BOC.¹⁶⁷ As stated above, we do not read section 274(b)(2) to preclude a creditor of a separated affiliate or electronic publishing joint venture from having recourse, upon default, to the assets of a BOC parent holding company. Further, given the clarity of section 274(b)(2), we see no need to adopt a rule at this time requiring contracts through which a separated affiliate or electronic publishing joint venture obtains credit to provide expressly that the creditor has no recourse to the assets of a BOC. BOCs, nevertheless, may include such a provision in their contracts, if they so choose.

3. Section 274(b)(5) and Shared Services

a. Background

71. Section 274(b)(5) provides that a separated affiliate and a BOC shall "(A) have no officers, directors, and employees in common after the effective date of this section; and (B) own no property in common."¹⁶⁸ We tentatively concluded in the *Notice* that, since this subsection does not specifically refer to electronic publishing joint ventures, BOCs are not precluded from sharing officers, directors, and employees with an electronic publishing joint venture.¹⁶⁹ We also tentatively concluded in the *Notice* that section 274(b)(5) does not preclude a BOC from owning property in common with an electronic publishing joint venture.¹⁷⁰

72. We also sought comment on the extent of the separation between a BOC and a separated affiliate required by section 274(b)(5)(A). We noted, for example, "that section 274(c)(2) permits joint marketing activities between a BOC and either a separated affiliate or electronic publishing joint venture under certain conditions."¹⁷¹ With respect to a BOC and a separated affiliate, we sought comment on "whether, to the extent that they are engaged in

¹⁶⁶ SBC at 6 & n.7.

¹⁶⁷ AT&T at 15-16.

¹⁶⁸ 47 U.S.C. § 247(b)(5).

¹⁶⁹ *Notice* at ¶ 39.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at ¶ 40.

permissible joint marketing activities, the separated affiliate may share marketing personnel with the BOC."¹⁷² We further sought comment on "how BOCs may engage in joint marketing activities with a separated affiliate pursuant to section 274(c)(2)(A) if they cannot share marketing personnel."¹⁷³

73. We invited comment on the types of property encompassed by the phrase "property in common." We tentatively concluded that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. We also tentatively concluded that it prohibits the joint ownership of telecommunications transmission and switching facilities, one of the separation requirements we adopted for independent LECs in the *Competitive Carrier Fifth Report and Order*.¹⁷⁴ Finally, we sought comment on whether the section 274(b)(5) prohibition on joint ownership of property between a BOC and its separated affiliate also precludes a BOC and a separated affiliate from sharing the use of property owned by one entity or the other and from jointly leasing any property.¹⁷⁵

b. Comments

74. Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures. The BOCs and NAA agree with our tentative conclusion that section 274(b)(5) does not preclude a BOC from having officers, directors, or employees in common with an electronic publishing joint venture. These parties also agree with our tentative conclusion that this section does not bar a BOC from owning property in common with its electronic publishing joint venture.¹⁷⁶ Other commenters disagree with our tentative conclusions. MCI and Time Warner maintain that section 274(b)(5) should apply to both separated affiliates and electronic publishing joint ventures and that interpreting this section to apply only to BOCs and their separated affiliates would undermine what they consider to be the separate substantive "operate independently" requirement of section 274(b).¹⁷⁷ AT&T recognizes that section 274(b)(5), on its face, does not prohibit a BOC from sharing common personnel or owning property in common with an electronic publishing joint venture, but argues that we have authority to proscribe such

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984) (*Competitive Carrier Fifth Report and Order*) at ¶ 9.

¹⁷⁵ *Notice* at ¶ 42.

¹⁷⁶ Ameritech at 12-13; Ameritech Reply at 10; Bell Atlantic at 5; Bell Atlantic Reply at 4-5; BellSouth at 11-12; NAA at 5; NAA Reply at 3-4; NYNEX at 8-9; PacTel at 10; PacTel Reply at 7-8; SBC at 7.

¹⁷⁷ MCI at 4-5; Time Warner at 14-15; 17-18; Time Warner Reply at 16-17.

sharing arrangements or ownership under section 274(b)(5), if necessary to ensure compliance with the "operated independently" language.¹⁷⁸

75. Extent of the Separation Required Between a BOC and a Separated Affiliate. Several BOCs state that section 274(b)(5)(A) should not be interpreted to act as a limitation upon the permissible joint marketing activities in section 274(c)(2). They contend that it is not necessary for a BOC and its separated affiliate to have employees in common to engage in the joint marketing activities permitted by section 274(c)(2). According to these commenters, employees of one entity may perform inbound telemarketing or referral services permitted under section 274(c)(2)(A) and (B) for the other entity.¹⁷⁹

76. SBC argues that a BOC and a separated affiliate, to the extent they engage in permissible joint marketing activities, should be allowed to employ individuals in common. Specifically, it states that "where there is a conflict between the authority conferred by [s]ection 274(c)(2) and the general operational independence requirements of Section 274(b), the former, more specific provisions should control."¹⁸⁰

77. AT&T states that section 274(b)(5) "prohibit[s] BOC personnel from participating in the operation, planning, marketing or other activities of the separated affiliate, and vice versa"¹⁸¹ MCI states that a BOC should only be allowed to provide telemarketing services pursuant to nondiscriminatory, publicly disclosed contracts.¹⁸²

78. "Property in Common." No commenters oppose and some commenters agree with our tentative conclusion that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. They further agree that this section prohibits the joint ownership of telecommunications transmission and switching facilities.¹⁸³

79. Shared Use or Joint Leasing of Property. The BOCs argue that section 274(b)(5)(B) does not prohibit a BOC and its separated affiliate from sharing the use of property owned by one of the entities, or from jointly leasing property. They maintain that

¹⁷⁸ AT&T Reply at 16-17.

¹⁷⁹ Bell Atlantic at 10-11; BellSouth at 15; NYNEX Reply at 10-11; PacTel at 10-11; U S WEST at 15-16. See *infra* ¶ 143.

¹⁸⁰ SBC at 7, 13; SBC Reply at 9.

¹⁸¹ AT&T at 16.

¹⁸² MCI at 5.

¹⁸³ AT&T at 16-17; MCI at 5; NAA at 5; Time Warner at 17 & n.26.

section 274(b)(5)(B) pertains only to ownership of property.¹⁸⁴ Several BOCs note that potential concerns arising from shared use of property are addressed by the requirements of section 274(b)(3).¹⁸⁵ AT&T and Time Warner, on the other hand, urge us to interpret section 274(b)(5)(B) to prohibit a BOC and its separated affiliate both from sharing property owned by one of the entities and from jointly leasing property.¹⁸⁶ MCI does not address whether this section permits joint leasing of property. It states, however, that joint use of property would invite the improper allocation of costs against which the separated affiliate requirement is intended to protect.¹⁸⁷ MCI and Time Warner specifically contend that a separated affiliate should not be permitted to collocate its equipment with BOC local exchange and exchange access equipment or to share computer facilities.¹⁸⁸

80. Sharing of Services. NYNEX and Ameritech argue that neither the Act nor its legislative history can be read to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by their parent holding company.¹⁸⁹ AT&T argues that we should prohibit, pursuant to section 274(b)(5), a BOC from establishing a second affiliate to perform services or own property for both the BOC and its separated affiliate.¹⁹⁰ MCI, in reply to the BOCs' comments, states that we should preclude the sharing of in-house functions, either by having one entity perform such functions

¹⁸⁴ Ameritech at 13; Ameritech Reply at 11; BellSouth at 15; NAA at 5; NYNEX at 9-10; NYNEX Reply at 7; PacTel at 11; SBC at 8; SBC Reply at 7-8; USTA at 4 (noting that we must continue to recognize the economies of integration derived from sharing that we have allowed under our *Computer II* structural separation requirements); U S WEST at 18-19; YPPA at 4-5.

¹⁸⁵ NAA at 5; NYNEX Reply at 7; PacTel at 11; SBC Reply at 7-8; USTA at 4; U S WEST at 18-19; YPPA at 4-5. Section 274(b)(3) provides that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated "shall carry out transactions (A) in a manner consistent with such [operational] independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted auditing standards."

¹⁸⁶ AT&T at 16-17 (contending that we should clarify that this section precludes a BOC from establishing a second affiliate to perform services or own property for both a BOC and its separated affiliate and from using any compensation system that bases the compensation of BOC personnel on the performance of the affiliate, or vice versa, discussed *infra* at ¶¶ 81, 87); AT&T Reply at 15; Time Warner at 13; Time Warner Reply at 12.

¹⁸⁷ MCI at 5; MCI Reply at 5-6.

¹⁸⁸ MCI Reply at 5; Time Warner at 13.

¹⁸⁹ Ameritech Reply at 12; NYNEX at 10-18; NYNEX Reply at 7-8; *see also* PacTel Reply at 8 (stating that nothing in section 274(b)(5)(A) prevents an affiliate of both a BOC and a separated affiliate from providing services to both of them).

¹⁹⁰ AT&T at 17.

for the other or by having another affiliate, or the parent, perform them for both a BOC and its separated affiliate.¹⁹¹

81. Other Activities. AT&T argues that we "should prohibit the BOCs from using any compensation system that directly or indirectly bases the compensation of BOC officers, directors, or other employees on the performance of the affiliate, or vice versa."¹⁹² The BOCs generally reply that there is no statutory basis for such a requirement, which would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses which are commonly used in industry and frequently are based, in part, upon the performance of entities within a corporate family.¹⁹³

c. Discussion

82. Applicability of Section 274(b)(5) to Electronic Publishing Joint Ventures. We adopt our tentative conclusion that section 274(b)(5)(A) does not preclude a BOC from having officers, directors, and employees in common with an electronic publishing joint venture. We also adopt our tentative conclusion that section 274(b)(5)(B) does not preclude a BOC from owning property in common with an electronic publishing joint venture. Congress expressly limited the scope of these restrictions to a BOC's separated affiliate. Moreover, we find no basis in this record for extending these restrictions to a BOC's electronic publishing joint venture. This determination is consistent with our finding above that the phrase "operated independently" in section 274(b) is not a separate substantive restriction and, therefore, does not provide a basis for making section 274(b)(5) applicable to electronic publishing joint ventures.¹⁹⁴

83. Extent of the Separation Required Between a BOC and a Separated Affiliate. We find that section 274(b)(5)'s provision barring a BOC and its separated affiliate from having "officers, directors, and employees in common" does not limit the permissible joint activities set forth in section 274(c)(2).¹⁹⁵ As certain commenters note, it is not necessary for a BOC and its separated affiliate to have employees in common to engage in the joint activities permitted under section 274(c)(2). For this reason, we reject those comments urging us to read section 274(c)(2) as allowing a BOC and its separated affiliate to have personnel in common for the purpose of engaging in permissible joint activities. Such an exception to the prohibition in section 274(b)(5) is not necessary to give effect to sections 274(b)(5) and

¹⁹¹ MCI Reply at 6.

¹⁹² AT&T at 17.

¹⁹³ BellSouth Reply at 13-14; PacTel Reply at 8; U S WEST Reply at 8-9.

¹⁹⁴ See *supra* ¶ 63.

¹⁹⁵ See generally part III.C.2, *infra*, discussing "permissible joint activities" pursuant to section 274(c)(2).

274(c)(2) and is not supported by the statutory language. While our interpretation of the interplay between section 274(b)(5) and section 274(c)(2) may result in some reduced efficiency in engaging in the joint activities permitted under section 274(c)(2),¹⁹⁶ we are not convinced that it will be substantial enough to warrant our reading into section 274(b)(5) an exception where none exists in the statutory language.¹⁹⁷

84. "Property in Common." We adopt our tentative conclusion that section 274(b)(5) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space, including telecommunications transmission and switching facilities. The prohibition against joint ownership of goods, facilities and physical space is clear on the face of the statute. Moreover, none of the commenters disagree with this tentative conclusion.

85. Shared Use or Joint Leasing of Property. We agree with the BOCs that the statutory prohibition in section 274(b)(5) does not preclude a BOC and its separated affiliate from either sharing the use of property owned by either a BOC or its separated affiliate or jointly leasing property. For example, we find that section 274(b)(5) permits a separated affiliate to collocate its equipment in end offices or on other property owned or controlled by the BOC, as long as such collocation agreements satisfy section 274(b)(3).¹⁹⁸ We also find that this section permits a BOC and its separated affiliate to contract with each other for the use of joint transmission and switching equipment, again subject to the requirements of section 274(b)(3). Those commenters arguing for an expanded interpretation of "own" to include a prohibition against shared use of property and joint leasing of property offer no statutory support for their position. We are unwilling to assume that Congress intended the prohibition against ownership of property in section 274(b)(5) to include leaseholds and the shared use of property owned by either a BOC or its separated affiliate. Further, we find that allowing shared use of property and joint leases between a BOC and its separated affiliate enables the BOC to take advantage of economies of scale and scope. Concerns about anticompetitive behavior can be addressed through the transactional requirements of section 274(b)(3), the nondiscrimination requirements of section 274(d), and the Commission's affiliate transaction rules.¹⁹⁹

86. Sharing of Services. The prohibition in section 274(b)(5)(A) against a BOC and its separated affiliate having "officers, directors, and employees in common" is worded slightly differently from the requirement in section 272(b)(3) that a BOC and its separate affiliate have "separate officers, directors, and employees." We interpret, however, these two

¹⁹⁶ See Notice at ¶ 40.

¹⁹⁷ Only SBC argues that requiring a BOC and its separated affiliate to employ separate marketing personnel "would reduce the efficiencies generally associated with joint marketing ventures." SBC at 7.

¹⁹⁸ See *supra* note 185, see also *Non-Accounting Safeguards Order* at ¶ 161.

¹⁹⁹ See 47 C.F.R. §§ 64.901-64.904.

provisions to have the same substantive meaning.²⁰⁰ Both sections 272 and 274 preclude the same person from serving simultaneously as an officer, director, or employee of both a BOC and its section 272 or 274 affiliate, respectively. Thus, an individual may not be on the payroll of both entities. Based on the record before us, we decline to read section 274(b)(5)(A) to prohibit a BOC and its separated affiliate from utilizing the administrative and corporate governance functions provided by their parent holding company or another BOC affiliate. Section 274 does not address whether the parent company of a BOC and its separated affiliate or another BOC affiliate is permitted to perform functions for both a BOC and its separated affiliate. There is no basis in the record for concluding that administrative and corporate governance functions provided to a BOC and its separated affiliate by a parent company or another BOC affiliate would result in the BOC and its separated affiliate violating section 274(b)(5)(A)'s prohibition on having "officers, directors, and employees in common." Further, a parent company that performs services for both a BOC and its section 274 separated affiliate must fully document and properly apportion the costs incurred in furnishing such services.²⁰¹

87. Other Activities. We reject AT&T's request that we interpret section 274(b)(5)(A) to prohibit compensation schemes that base the level of remuneration of BOC officers, directors, and employees on the performance of the section 274 separated affiliate, or vice versa. We find that tying the compensation of an employee of a section 274 separated affiliate to the performance, for example, of the BOC's parent holding company and all of its enterprises as a whole, including the performance of the BOC, does not make that individual an employee of the BOC for purposes of section 274(b)(5)(A). Nor does such a compensation arrangement for a BOC employee make that individual an employee of the section 274 separated affiliate.²⁰² Further, we agree with those commenters stating that such a scheme would effectively preclude BOCs from offering stock options, other forms of deferred compensation, and bonuses, which are commonly used in industry and frequently are based, in part, upon the performance of entities within a corporate family.²⁰³ Indeed, as PacTel notes, "[i]t is common for corporations to have compensation systems that base a portion of compensation, especially for officers and directors, on the performance of the corporation as a whole. This is consistent with the fiduciary duty of corporate officers and directors"²⁰⁴

²⁰⁰ See *Non-Accounting Safeguards Order* at ¶ 178.

²⁰¹ See 47 C.F.R. §§ 64.901-64-904.

²⁰² See also *Non-Accounting Safeguards Order* at ¶ 186.

²⁰³ See *supra* ¶ 81.

²⁰⁴ PacTel Reply at 8.

4. Section 274(b)(6)

a. Background

88. Section 274(b)(6) states that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing [BOC] except for names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC]."²⁰⁵ We tentatively concluded that this provision is sufficiently precise as to make unnecessary the adoption of implementing regulations.²⁰⁶

b. Comments

89. Time Warner asks us to clarify that the prohibition in section 274(b)(6) prevents a BOC from sharing a name, trademark, or service mark with the Regional Bell Holding Company ("RBOC"). It argues that the exception in section 274(b)(6) permitting the separated affiliate or electronic publishing joint venture to use the name, trademark, or service mark of the RBOC would "vitiating the general prohibition against cross-labeling if the BOC affiliates or joint ventures were permitted to use names, trademarks, or service marks that are shared by an operating company and the [RBOC]."²⁰⁷

90. The BOCs and YPPA, in reply, state that Time Warner's suggestion is unsupported by the statutory language and would eliminate the express statutory exception Congress created in section 274(b)(6).²⁰⁸

c. Discussion

91. We adopt our tentative conclusion that section 274(b)(6) does not require the adoption of implementing regulations. We find that Time Warner's suggestion is contradicted by the statutory language and legislative history that expressly allow a separated affiliate or electronic publishing joint venture to use "the names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC]."²⁰⁹ We agree with BellSouth that the adoption of Time Warner's suggestion "would require the Commission to assume that

²⁰⁵ 47 U.S.C. § 274(b)(6).

²⁰⁶ Notice at ¶ 43.

²⁰⁷ Time Warner at 16-17.

²⁰⁸ Ameritech Reply at 14-15; Bell Atlantic Reply at 7; BellSouth Reply at 14-15; NYNEX Reply at 8; PacTel Reply at 9; SBC Reply at 10-11; YPPA Reply at 7-8.

²⁰⁹ 47 U.S.C. § 274(b)(6); see Joint Explanatory Statement at 155.

Congress was unaware that four of the seven [RBOCs] share their names with their BOC subsidiaries."²¹⁰ We decline to make this assumption.

5. Section 274(b)(7)

a. Background

92. Section 274(b)(7) states that a BOC is not permitted "(A) to perform hiring or training of personnel on behalf of a separated affiliate; (B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or (C) to perform research and development on behalf of a separated affiliate."²¹¹ Since this subsection does not specifically refer to electronic publishing joint ventures, we tentatively concluded that BOCs are permitted to perform these functions on behalf of an electronic publishing joint venture.²¹² In addition, we sought comment on whether, "[t]o the extent that a BOC and a separated affiliate are engaged in permissible joint marketing activities," a BOC may perform the hiring or training of marketing personnel on behalf of its separated affiliate under section 274(b)(7)(A).²¹³ We also sought comment on the type of "equipment" encompassed by section 274(b)(7)(B). We asked, for example, whether a BOC providing telephone service to a separated affiliate under tariff or contract subject to the requirements of section 274 is permitted under section 274(b)(7)(B) to purchase, install, and maintain transmission equipment for the separated affiliate.²¹⁴

93. With respect to section 274(b)(7)(C), we asked whether there are any circumstances under which a BOC may share its research and development with its separated affiliate. Specifically, we sought comment on whether this provision simply limits a BOC's ability to perform research and development for the sole and exclusive use of a separated affiliate, or whether it requires a BOC to refrain from performing any research and development that may be potentially useful to a separated affiliate. We also asked about other ways in which this provision may limit a BOC's ability to perform research and development for the separated affiliate.²¹⁵

²¹⁰ BellSouth Reply at 14.

²¹¹ 47 U.S.C. § 274(b)(7).

²¹² Notice at ¶ 44.

²¹³ *Id.* at ¶ 45.

²¹⁴ *Id.*

²¹⁵ *Id.* at ¶ 46.

b. Comments

94. Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures. The BOCs and NAA agree with our tentative conclusion that BOCs are permitted to perform the functions in section 274(b)(7) on behalf of an electronic publishing joint venture.²¹⁶ Time Warner and AT&T disagree with our tentative conclusion. They maintain, consistent with their argument respecting section 274(b)(5), that section 274(b)(7) should apply to both a separated affiliate and an electronic publishing joint venture. They state that this interpretation is necessary to give effect to what they consider a separate substantive requirement that a BOC be "operated independently" from its electronic publishing joint venture.²¹⁷

95. Relationship Between Section 274(b)(7)(A) and Section 274(c)(2). Several commenters argue that there is no exception in section 274(b)(7) for permissible joint marketing activities in section 274(c)(2) and, therefore, we should not permit a BOC, when engaged in permissible joint marketing with its separated affiliate, to perform the hiring or training of marketing personnel on behalf of the separated affiliate.²¹⁸ SBC, however, argues that we should allow a BOC to hire and train marketing personnel to carry out the permissible joint marketing activities in section 274(c)(2). It states that this approach is not anticompetitive because teaming or other business arrangements entered into by a BOC pursuant to section 274(c)(2)(B) must be conducted on a nondiscriminatory basis.²¹⁹

96. The Type of "Equipment" Encompassed by Section 274(b)(7)(B). The majority of commenters agree that section 274(b)(7)(B) permits a BOC to purchase, install, and maintain transmission equipment for its separated affiliate if the BOC is providing telephone service to the separated affiliate under tariff or contract.²²⁰ Bell Atlantic urges us to differentiate between "provision of a service that uses equipment owned by the BOC, an arrangement specifically permitted under this subsection, from the purchasing, installation,

²¹⁶ Ameritech at 14; Ameritech Reply at 10; Bell Atlantic at 5; Bell Atlantic Reply at 4 & n.10; BellSouth at 12; BellSouth Reply at 11-12; NAA at 5; NAA Reply at 3; PacTel at 12; PacTel Reply at 9-10; SBC at 8-9.

²¹⁷ Time Warner at 14-15; 20; Time Warner Reply at 16-17; AT&T Reply at 16-17 (acknowledging that section 274(b)(7) does not expressly bar a BOC from performing the functions in that section on behalf of an electronic publishing joint venture, but asserting that the "operated independently" language gives the Commission the authority to preclude such activities between a BOC and an electronic publishing joint venture). MCI made the same argument only with respect to section 274(b)(5).

²¹⁸ AT&T at 18; NAA at 5; Time Warner at 19; Time Warner Reply at 10-11.

²¹⁹ SBC at 9.

²²⁰ Ameritech at 15 (as long as transmission equipment is an integral part of a BOC provision of telephone service); Bell Atlantic at 6; NAA at 5-6; PacTel at 12; SBC at 10; USTA at 4.

and maintenance of equipment 'on behalf of' the affiliate, which is barred."²²¹ The distinction, according to Bell Atlantic, is that in the latter situation, the equipment would be owned by the separated affiliate. U S WEST similarly states that this section prohibits a BOC from providing any depreciable equipment to be used by its separated affiliate in conducting the affiliate's business, but that it does not prohibit a BOC from providing services to its section 274 affiliate operation.²²² Several other BOCs argue that the provision of telephone services includes purchasing, installation, or maintenance of transmission equipment, and any other equipment necessary or incidental to providing such service. They note that section 274(b)(3) ensures that there are ample safeguards that such transactions are conducted at arm's length.²²³ Other commenters state only that section 274(b)(7)(B) requires BOCs to provide telephone service pursuant to section 274(d).²²⁴ Time Warner specifically urges us to require BOCs to provide unaffiliated electronic publishers with the same access to wireline telephone exchange services that they provide to their in-region separated affiliate or electronic publishing joint venture.²²⁵

97. Limitations on Research and Development. The BOCs, NAA, and USTA generally argue that section 274(b)(7)(C) only limits their ability to perform research and development for the sole and exclusive use of the separated affiliate. They contend that it would be against public policy to restrict BOCs from performing research and development simply because the results might, at some later date, be applied to electronic publishing.²²⁶ Time Warner argues that the statutory language of section 274(b)(7)(C) should lead us to prohibit BOCs, under any circumstances, from sharing any research and development work or results with their in-region electronic publishing affiliates. It further states that we should adopt the *Computer II* rules that preclude specific research and development by the regulated entity on behalf of the competitive affiliate.²²⁷ AT&T, in reply to the BOCs' comments, states only that we "should reject the BOCs' attempts to circumvent the prohibition in

²²¹ Bell Atlantic at 6 (emphasis in original).

²²² U S WEST at 19-20.

²²³ PacTel at 12; SBC at 10; SBC Reply at 12; USTA at 4.

²²⁴ AT&T at 18; Time Warner at 19.

²²⁵ Time Warner at 19.

²²⁶ Ameritech at 15 (contending that section 274(b)(7)(C) only prohibits BOC research and development activity for the sole or "primary" use of a separated affiliate); Ameritech Reply at 11; Bell Atlantic at 6-7; BellSouth at 13-14 & n.33; NAA at 6; NYNEX Reply at 8-9; PacTel at 12-13; PacTel Reply at 10; SBC at 10-11; SBC Reply at 12-13; USTA at 5; U S WEST at 20; U S WEST Reply at 9 (contending that a BOC is permitted to engage in R&D and to share it with all entities within the corporate family as long as it is not performed "solely, exclusively, or primarily for the electronic publishing affiliate").

²²⁷ Time Warner at 19-20 & n.20; Time Warner Reply at 12.

[s]ection 274(b)(7)(C) against BOC research and development on behalf of a separated affiliate through hypertechnical constructions."²²⁸

c. Discussion

98. Applicability of Section 274(b)(7) to Electronic Publishing Joint Ventures. We adopt our tentative conclusion that section 274(b)(7) does not preclude a BOC from performing the activities in section 274(b)(7) on behalf of an electronic publishing joint venture. The reasons supporting this determination are the same as those supporting our determination that section 274(b)(5) is inapplicable to electronic publishing joint ventures.²²⁹

99. Relationship Between Section 274(b)(7)(A) and Section 274(c)(2). We agree with those commenters asserting that the restrictions in section 274(b)(7)(A) on a BOC performing the hiring or training of personnel on behalf of a separated affiliate apply even when the BOC is engaged in permissible joint activities pursuant to section 274(c)(2).²³⁰ Reading an exception into section 274(b)(7)(A) for the joint activities permitted under section 274(c)(2) is neither supported by the statutory language, nor necessary to give effect to that section and section 274(c)(2). Thus, a BOC may not perform the hiring or training of personnel on behalf of its separated affiliate, even though it may be engaged in permissible joint activities under section 274(c)(2), such as providing inbound telemarketing services or engaging in nondiscriminatory teaming or business arrangements, as discussed below.²³¹

100. The Type of "Equipment" Encompassed by Section 274(b)(7)(B). We find that section 274(b)(7)(B) prohibits a BOC from purchasing, installing, or maintaining equipment on behalf of its separated affiliate, except for the telephone service that it provides under tariff or contract. We agree with the position of several commenters that the provision of telephone service includes purchasing, installing, and maintaining equipment necessary or incidental to providing such service.²³² As long as the equipment providing the telephone service is owned by a BOC, and not its separated affiliate, such activities are permissible under this section. We note, as some commenters suggest, that, even when engaging in permissible activities under section 274(b)(7), BOCs remain subject to the nondiscrimination requirements in section 274(d).²³³

²²⁸ AT&T Reply at 16.

²²⁹ See *supra* ¶¶ 62-63, 82.

²³⁰ See generally discussion of "permissible joint activities," *infra* part III.C.2.

²³¹ *Id.*

²³² See *supra* ¶ 96.

²³³ See *id.*

101. Limitations on Research and Development. We conclude that the prohibition in section 274(b)(7)(C) on a BOC performing research and development "on behalf of" its separated affiliate precludes a BOC, at a minimum, from performing research and development for the sole and exclusive use of the separated affiliate. We also find that it precludes a BOC from performing research and development for the use or benefit of its section 274 separated affiliate together with other affiliates. We further conclude, however, that the prohibition in section 274(b)(7)(C) on a BOC performing research and development "on behalf of" its separated affiliate, as interpreted herein, does not limit a BOC's ability to perform research and development simply because the results might, at a future date, be applied to electronic publishing. We agree with those commenters arguing that such an interpretation "would not serve the public's continued desire for new and different communications solutions"²³⁴ and would be "antithetical to the public interest and national policy under Section 7 of the Communications Act."²³⁵ We also find that it would be impractical for a BOC to anticipate all potential uses of research and development activities it might undertake.²³⁶ We recognize that these principles may not address all of the possible scenarios that may arise. Such determinations are fact specific and will need to be made on a case-by-case basis.

102. Further, we disagree with Time Warner that prohibiting a BOC from sharing any research and development work or results with its separated affiliate is supported by the statutory language. Time Warner and AT&T fail to offer any persuasive statutory or policy arguments in support of their position.

6. Comparison with "Separate Affiliate" Requirement of Section 272

a. Background

103. We sought comment in the *Notice* on the interrelationship between the requirements for a "separate affiliate" in section 272(b) and the requirements for a "separated affiliate" and "electronic publishing joint venture" in section 274(b).²³⁷ To the extent that certain BOCs currently are providing all of their information services on an integrated basis, we sought comment on what modifications these BOCs would have to make to their current

²³⁴ SBC at 11.

²³⁵ BellSouth at 13-14, citing 47 U.S.C. § 157(a). This section provides that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest."

²³⁶ BellSouth at 13-14.

²³⁷ *Notice* at ¶ 47. We note that the structural and transactional requirements in section 272 for a "separate affiliate" are different than those in section 274 for a "separated affiliate."

provision of service in order to provide electronic publishing services in compliance with the separated affiliate or electronic publishing joint venture requirements of section 274.²³⁸

104. We also sought comment on whether a BOC may provide electronic publishing services through the same entity or affiliate through which it provides in-region interLATA telecommunications services, manufacturing activities, and interLATA information services.²³⁹ In addition, we sought comment on whether a BOC providing any or all of its section 272 services and its section 274 electronic publishing services through the same entity would have to comply with the requirements of section 272, section 274, or both.²⁴⁰

b. Comments

105. There were few comments on the interrelationship between the requirements in sections 272(b) and 274(b). Ameritech states that the requirements of section 272(b) are a subset of those found in section 274(b), but that section 274(b) imposes additional requirements beyond those in section 272(b). It notes that another principal difference between the separation requirements of the two sections is that a section 272 separate affiliate may own or be owned by a BOC as long as the separation requirements of that section are satisfied; however, a section 274 separated affiliate may not own or be owned by the BOC entity.²⁴¹ NYNEX states that sections 272 and 274 deal with considerably different affiliate activities and should be construed to be independent of each other.²⁴² PacTel states that, to the extent there are similarities in the requirements specified in sections 272(b) and 274(b), those requirements should be interpreted consistently.²⁴³

106. AT&T also notes that several of the requirements in the two sections overlap, but, like Ameritech states, that section 274(b) imposes additional requirements having no counterpart in section 272(b).²⁴⁴ AT&T further asserts that all interLATA electronic publishing services should be subject to the requirements of section 272, and that section 274

²³⁸ *Id.*

²³⁹ *Id.* at ¶ 48.

²⁴⁰ *Id.*

²⁴¹ Ameritech at 10-11.

²⁴² NYNEX at 10.

²⁴³ PacTel at 13.

²⁴⁴ AT&T at 18-19 & n.12 (noting that sections 274 (b)(4),(b)(5)(B), (b)(6), (b)(7) and (b)(8) have no counterpart in section 272(b)).

merely supplements the requirements of section 272.²⁴⁵ In reply, Bell Atlantic and YPPA state that a section 274 separated affiliate need not also comply with section 272, even if the electronic publishing services are interLATA. They maintain that Congress, in enacting section 272(a)(2)(C), expressly exempted interLATA electronic publishing services from the requirements of section 272.²⁴⁶

107. All of the commenters agree that a BOC may provide electronic publishing services through the same entity or affiliate through which it provides section 272 services.²⁴⁷ They disagree, however, on whether an affiliate providing both section 272 and section 274 services must comply with all of the requirements of both sections. AT&T, MCI and Time Warner state that a BOC offering electronic publishing services and section 272 services through the same affiliate must comply with all of the requirements of sections 272 and 274, *i.e.*, the structural separation and transactional requirements, as well as the joint marketing and nondiscrimination provisions of both sections.²⁴⁸

108. The BOCs and YPPA disagree with the other commenters. They argue that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with the separation requirements in both sections 272(b) and 274(b) on a service-by-service basis. Specifically, they maintain that the entity providing both section 272 services and electronic publishing services must comply only with the requirements of each section relevant to the particular service (*i.e.*, a section 272 service or electronic publishing services) being provided. They further argue that a BOC need only comply with the joint marketing and nondiscrimination restrictions of sections 272 and 274 on a service-by-service basis.²⁴⁹

109. There is some disagreement among the BOCs as to those requirements in section 274(b) that they deem applicable when providing section 272 and section 274 services through the same entity. Several BOCs assert that the separation requirements unique to either section 272 or section 274 would apply only to those services specified in their respective sections, *e.g.*, because section 272 does not prohibit the hiring and training of personnel, section 274(b)(7)(A) would only apply with respect to the entity's electronic

²⁴⁵ AT&T at 2-4.

²⁴⁶ Bell Atlantic Reply at 2-4; YPPA Reply at 5-6.

²⁴⁷ Ameritech at 12; Ameritech Reply at 11; AT&T at 19; Bell Atlantic at 7; BellSouth at 15-16; MCI at 6; NYNEX at 5; NYNEX Reply at 13; PacTel at 13-14; Time Warner at 31; Time Warner Reply at 12; U S WEST at 3-4; U S WEST Reply at 4; YPPA at 5.

²⁴⁸ AT&T at 19; MCI at 6; Time Warner at 31-32; Time Warner Reply at 12-13.

²⁴⁹ Ameritech at 12 & n.34; Ameritech Reply at 11-12 & n.36; Bell Atlantic at 7; BellSouth at 16 n.37; NYNEX at 5; NYNEX Reply at 13; PacTel at 13-14; PacTel Reply at 11; U S WEST at 3-4; U S WEST Reply at 4-6; YPPA at 5-6; YPPA Reply at 4-6.

publishing activities.²⁵⁰ U S WEST categorizes those requirements that the entity must comply with in sections 272(b) and 274(b) as structural separation requirements, arguing that compliance with the "transactional" requirements of either section is necessitated on a service-by-service basis.²⁵¹ It categorizes section 274(b)(7)(A) as an example of a transactional requirement. YPPA, too, distinguishes between the structural separation requirements and the affiliate transaction requirements of sections 272(b) and 274(b), arguing that the latter need only be complied with on a service-by-service basis. It cites sections 272(b)(5) and 274(b)(3) as examples of affiliate transaction requirements that need only be complied with on a service-by-service basis.²⁵²

c. Discussion

110. We conclude that a BOC may provide electronic publishing services and section 272 services through the same entity or affiliate. Nothing in the Act or its legislative history suggests otherwise. We further conclude that the BOC or the entity providing both section 272 and section 274 services, as applicable, must comply with the requirements of both these sections, including: (1) all of the requirements of section 272(b) and section 274(b); (2) all applicable requirements of section 272(g) and section 274(c); and (3) all applicable requirements of section 272(c) and section 274(d). To the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. These conclusions are discussed more fully below. We specifically reject AT&T's contention that electronic publishing services are subject to the section 272 separate affiliate requirements, pursuant to section 272(a)(2)(B), which imposes a separate affiliate requirement on interLATA telecommunications services.²⁵³ Electronic publishing services are included within the statutory definition of information services in section 153(20).²⁵⁴ They

²⁵⁰ Ameritech Reply at 12 & n.36; Bell Atlantic at 7 (stating that any combined activities would be subject to the restrictions contained in both sections, "to the extent those restrictions differ," but that separable activities within the same affiliate would, where feasible, be subject only to the section of the statute addressing each activity); NYNEX at 5; NYNEX Reply at 13-14; PacTel at 13-14; U S WEST at 3-4; U S WEST Reply at 4-6. We note that Ameritech, in its initial comments, asserted that "the affiliate chosen to house both Section 272 and Section 274 services must comply with the separations [sic] requirements of both Sections." Ameritech at 12 n.34.

²⁵¹ U S WEST at 4-5; U S WEST Reply at 4-6.

²⁵² YPPA at 5-6; YPPA Reply at 4-6.

²⁵³ AT&T at 2-4.

²⁵⁴ 47 U.S.C. § 153(20).

are specifically excluded, however, from the section 272 separate affiliate requirement pursuant to section 272(a)(2)(C).²⁵⁵

111. Section 272(b) and Section 274(b) Requirements. We agree with those commenters asserting that a BOC providing electronic publishing services through the same entity or affiliate through which it provides section 272 services must comply with all of the requirements of both section 272(b) and section 274(b). Allowing the BOCs to comply with the requirements of sections 272(b) and 274(b) on a service-by-service basis is likely to lead to *ad hoc* determinations as to those requirements in both sections 272(b) and 274(b) with which the entity must comply.²⁵⁶

112. We find that allowing the entity performing section 272 and section 274 services to determine how to comply with the section 272(b) and section 274(b) requirements creates the potential for administrative and enforcement problems. As a practical matter, however, requiring the entity providing both section 272 and section 274 services to comply with all the requirements of sections 272(b) and 274(b) will not be substantially more onerous than requiring the entity to comply with only those provisions of one section or the other. We determined in the *Non-Accounting Safeguards Order* that the "operate independently" requirement of section 272(b)(1) imposes requirements beyond those listed in subsections 272(b)(2)-(5). We therefore adopted additional requirements in our rules to implement section 272(b) to ensure operational independence between a BOC and its section 272 affiliate; several of these are parallel to provisions in section 274(b).²⁵⁷ Thus, BOCs providing section 272 and section 274 services are already required to comply with many of the same requirements; and to the extent these services are combined the complications of complying with both sections 272(b) and 274(b) will be few.

113. Joint Marketing and Nondiscrimination Provisions in Sections 272 and 274. As noted above, while a BOC may provide both section 272 services and electronic publishing services through the same entity, it must comply with the applicable joint marketing and nondiscrimination provisions in both sections 272 and 274. With respect to the joint marketing provisions, if a BOC chooses to provide section 272 services together with its electronic publishing services, it must comply with the joint marketing restrictions of section

²⁵⁵ See *Non-Accounting Safeguards Order* at ¶ 142.

²⁵⁶ For example, the commenters suggest some confusion as to those requirements in section 274(b) we should deem inapplicable when the entity is providing only section 272 services. Ameritech and PacTel state that the entity providing both section 272 and section 274 services must satisfy only the separation requirements common to both sections. See Ameritech Reply at 11-12 & n.36; PacTel at 13-14. U S WEST agrees with Ameritech and PacTel. It, however, refers to sections 274(b)(5) and 274(b)(7), which have no counterpart in section 272(b) as "transactional," even though they are addressed in the *Notice* as structural separation requirements of section 274(b). YPPA, on the other hand, refers to section 274(b)(3) as an affiliate transaction requirement, consistent with our treatment of that subsection in the *Accounting Safeguards Order*.

²⁵⁷ See *Non-Accounting Safeguards Order* at ¶¶ 156-70.

274(c)(1)(A) and section 272(g). Section 274(c)(1)(A) precludes the BOC from carrying out any "promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."²⁵⁸ An entity established by a BOC to provide section 272 services and electronic publishing services is a section 274 "separated affiliate" for purposes of section 274(c)(1)(A), as it will be a "corporation . . . that engages in the provision of electronic publishing services."²⁵⁹ The BOC, therefore, must comply with all the section 274 joint marketing provisions pertaining to its "separated affiliate." In addition, since the entity is also providing section 272 services, the joint marketing provisions in section 272(g) would apply as well.

114. The statutory language in sections 272(c) and 274(d) also requires that a BOC providing both section 272 services and electronic publishing services together in one entity comply with the nondiscrimination provisions in both sections 272 and 274. To the extent that a BOC under "common ownership or control with a separated affiliate or electronic publishing joint venture" provides "network access and interconnections for basic telephone service to electronic publishers,"²⁶⁰ it must do so subject to the nondiscrimination requirements in section 274(d).²⁶¹ In addition, section 272(c) imposes certain nondiscrimination safeguards on a BOC's dealings with an affiliate providing section 272 services.²⁶² The nondiscrimination safeguards of section 272(c) thus pertain to the BOC's dealings with an entity or affiliate providing both section 272 services and electronic publishing services.

115. In sum, we find that a BOC may provide both section 272 and section 274 services through the same entity, but in doing so, must comply with the applicable joint marketing and nondiscrimination requirements in each of those sections. We find that the express statutory language in each of those sections compels this result. As noted above, to the extent there is a conflict between the provisions of sections 272 and 274, the BOC or the entity providing both section 272 and 274 services, as applicable, must comply with the more stringent requirement of either section. For example, if a BOC is permitted to engage in a joint marketing activity under section 272(g), but that activity is barred under section 274(c)(1)(A), the latter provision would preclude the BOC from engaging in that activity.

²⁵⁸ 47 U.S.C. § 274(c)(1)(A). *See discussion infra* part III.C.1.

²⁵⁹ Section 274(i)(9) defines "separated affiliate" as a "corporation under common ownership or control with a [BOC] that does not own or control a [BOC] and is not owned or controlled by a [BOC] and that engages in the provision of electronic publishing which is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service." 47 U.S.C. § 274(i)(9).

²⁶⁰ 47 U.S.C. § 274(d).

²⁶¹ *See discussion of section 274(d) infra* part III.D.

²⁶² *See* 47 U.S.C. § 272(c).

C. Joint Marketing

1. Restrictions on Joint Marketing Activities -- Section 274(c)(1)

a. Scope of Section 274(c)(1)(B)

1) Background

116. Section 274(c)(1) of the Act establishes several restrictions on joint marketing activities in which a BOC may engage with either a "separated affiliate" or an "affiliate." In particular, section 274(c)(1)(A) provides that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."²⁶³ Section 274(c)(1)(B) states that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing."²⁶⁴

117. In the *Notice*, we observed that the clause "that is related to the provision of electronic publishing" in section 274(c)(1)(B) may be interpreted to modify either the "promotion, marketing, sales, or advertising" activities that are circumscribed by that section, or the word "affiliate."²⁶⁵ We also noted that the definition of "affiliate" in section 274 expressly excludes a "separated affiliate."²⁶⁶ We therefore sought comment on the proper interpretation of section 274(c)(1)(B).²⁶⁷

2) Comments

118. Several commenters argue that section 274(c)(1)(B) of the Act should be interpreted to prohibit a BOC from carrying out joint marketing activities for or in conjunction with an affiliate if the *activities* of the BOC relate to the provision of electronic publishing.²⁶⁸ In particular, BellSouth argues that section 274(c)(1)(B) is intended to address situations in which a BOC affiliate offers electronic publishing services or services related to electronic publishing, and non-electronic publishing services, *i.e.*, an affiliate that provides

²⁶³ 47 U.S.C. § 274(c)(1)(A).

²⁶⁴ *Id.* § 274(c)(1)(B).

²⁶⁵ *Notice* at ¶ 50.

²⁶⁶ *Id.* at ¶ 49.

²⁶⁷ *Id.* at ¶ 50.

²⁶⁸ Ameritech at 18; BellSouth at 17; SBC at 11.